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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRENDA COLLEEN WILEY, Defendant and Appellant.	A132408 (San Mateo County Super. Ct. No. SC072473A)

I. INTRODUCTION

Appellant pled no contest to one count of a six-count amended information and, pursuant to Penal Code section 1170.12, subdivision (c)(1), admitted a prior strike conviction.[1] The remaining counts of the information were dismissed. Appellant then moved the court, pursuant to section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*), to dismiss the prior strike conviction. The court declined to do so pursuant to the discretion granted it by that decision. Appellant appeals from the resulting judgment, including the prison sentence imposed on her, and also contends that the abstract of judgment must be corrected, a point with which the Attorney General agrees. We affirm, except to remand to the trial court to correct the abstract of judgment

II. FACTUAL AND PROCEDURAL BACKGROUND

In September 2010, the San Mateo County Narcotics Task Force received information that appellant, then a woman age 48, was selling narcotics out of her garage

[1] Unless otherwise noted, all subsequent statutory citations are to the Penal Code.

in Redwood City. At that point in time, she was on probation for a January 2009 drug conviction and subject to a search and seizure clause.

On November 16, 2010, agents of the task force conducted a probationary search of appellant's residence and garage. Appellant was standing in the garage when they approached, and specifically approved the search. In a small storage room in the garage, the agents found multiple drugs (including marijuana and methamphetamine) and drug-packaging and sales equipment, including several scales, glass pipes, etc. Appellant at first denied, later admitted, and then denied again selling drugs.

By an amended information filed on March 22, 2011, appellant was charged with six counts. The first five alleged, respectively, felony possession of methamphetamine, psilocybin, marijuana, hydrocodone, and oxycodone for sale, and the final count alleged misdemeanor possession of paraphernalia used for injecting or smoking a controlled substance. (Health & Saf. Code, §§ 11378, 11359, 11350, & 11364.)

The information also alleged that appellant had been convicted of three prior felonies, i.e., violating Vehicle Code sections 23153, subdivision (b), and 20001, on October 17, 1997, and violating Health and Safety Code section 11377, subdivision (a), in September 2009.[2]

The same day, i.e., March 22, 2011, appellant pled no contest to the first count of the amended information and admitted the first Vehicle Code prior conviction just noted. The remaining counts were dismissed.

On June 8, 2011, appellant moved the court, pursuant to *Romero*, to dismiss the prior strike conviction. Oral argument on this motion was had before the trial court on June 10, 2011. After hearing argument, the court denied the motion.

Appellant filed a timely notice of appeal on June 22, 2011.

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[2] In order listed, these offenses were (1) driving under the influence of more than .08 percent alcohol, (2) leaving the scene of an accident (the two October 1997 offenses), and (3) unauthorized possession of a controlled substance (the September 2009 conviction).

III. DISCUSSION

As appellant concedes in her brief to us, we review a trial court's order denying a motion to strike a prior conviction under section 1385 for abuse of discretion. Our Supreme Court held to this effect in *People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*), and to the same effect several other times. (See, e.g., *Romero, supra,* 13 Cal.4th at pp. 530-531; *People v. Carmony* (2004) 33 Cal.4th 367, 374-377 (*Carmony*); *People v Garcia* (1999) 20 Cal.4th 490, 497-499.)

In *Williams,* the court explained that an application of the abuse of discretion standard "asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Williams, supra,* 17 Cal.4th at p. 162.) It elaborated on the application of this standard of review in the sentencing context in *Carmony*, where it stated: "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at pp. 376-377; see also, to the same effect, *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310 ["an appellant who seeks reversal must demonstrate that the trial court's decision was irrational or arbitrary."].)

As noted above, in this case the trial court (the Honorable Lisa Novak) specifically considered whether or not to exercise its discretion regarding appellant's prior conviction. At the conclusion of the argument on appellant's *Romero* motion, the court stated to appellant: "Ms. Wiley, in determining whether or not to grant the relief that you are

seeking, you should understand the following: First and foremost, you are not statutorily eligible for probation because of the prior strike conviction. However, I do have the discretion to strike that prior that you have admitted if certain factors compel me to do so or persuade me to do so. I have to look at the facts of the case before me, your prior history, focusing on the prior strike conviction, as well as characteristics particular to you and your prospects for success in the community in the future.

"The underlying facts of the prior strike are quite egregious. It is one of those situations where it is certainly a serious felony and one that results from your consumption of alcohol and then driving and injuring someone extremely seriously is different than someone who willfully goes out and hurts someone, but that doesn't mitigate in my opinion from the seriousness of that offense.

"The facts as described in the probation report and highlighted by Ms. Clipper are certainly disconcerting to say the least, and the victim in that case suffered severe injuries.

"The callousness of driving away from an injury collision, regardless of whether or not you were under the influence of alcohol, is something that does not escape the court. Your blood alcohol at that time was exceedingly high, a .23 percent, and I certainly give you credit for after that incident of giving up alcohol. . . .

"What is disconcerning [sic] to me, however, is that you suffered probation violations in that case, probation was revoked, and you were sentenced to state prison.

"Upon your release from prison, you, while perhaps not continuing to involve yourself in the use of alcohol, took up with the use of controlled substances and were convicted in 2009 for a possession of a controlled substance and got the very relief that you're asking for today, and that is the court granted a Romero motion, placed you on probation, and then it was while you were on that grant of probation that you took up in selling drugs. You became a drug dealer. And you suffered multiple probation violations on that grant of probation before you were arrested on this case.

"That is the best indication that I have of how you would do if I place you on probation again. I find these circumstances of the offense before me to be very serious,

quite frankly. This is not a possession case. This is not someone who is simply in the throws of addiction.

"I was dumbfounded by the facts of this case when we pretried it that you had a regular cornucopia of controlled substances at your house which you were more than happy to sell for your own benefit, and the probation report certainly documents those controlled substances at page 7.

"You possessed crystal methamphetamine, you possessed marijuana, you possessed psilocybin all for the purposes of sale; and you had over $2,000 in cash, functioning digital scales in the quantity of four, empty plastic baggies as well as other controlled substances which would indicate that they were possessed for personal use. That reaffirms the proposition that you were a drug dealer. That's what you chose to do. You are old enough to know better. . . .

"You completely squandered your opportunity to avoid a future prison commitment just back in 2009 and 2010 by continuing to violate the law, and then to escalate your criminality by transforming yourself from a substance abuser to a drug dealer, a drug dealer of many substances, and that is to me a very aggravating factor.

"You have participated in residential treatment in the past. While I recognize that you are seeking residential treatment at this time and there are certainly quality programs which could provide services to you, I have absolutely no faith that you would be a successful candidate if you were placed on probation because of how you've participated and failed on probation in the very recent past.[3]

"I do not find there are sufficient factors for granting the relief that you are seeking. It is a shame, and I'll say it again, that you squandered the opportunity that you received just in 2009 when a judge granted the Romero motion[4] which I would have

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[3] The trial court was clearly referring to the fact that, earlier in 2010, i.e., prior to her November 2010 arrest in this case, appellant's probation (for her September 2009 drug offense conviction) was twice revoked, although later reinstated.

[4] The trial court was referencing the fact that, in connection with her September 2009 conviction under Health and Safety Code section 11377, subdivision (a), for

probably done at that time as well, but you have demonstrated that you are not worthy of that relief this time because you cannot comply with reasonable terms and conditions of probation.

"And with that, the Romero motion is denied."

In her briefs to us, appellant argues that the trial court abused its discretion in this ruling. Specifically, she argues that the "facts before the trial court, especially regarding Ms. Wiley's past unsatisfactory performance on probation, may have made the court's decision to deny probation and send Ms. Wiley to state prison reasonable. However, in light of all the other circumstances before the trial court—including the nature of the current offenses, the nature of the strike prior [sic: prior strike], Ms. Wiley's past success in staying sober for an extended period and holding a responsible job, and her actions subsequent to her arrest—it was unreasonable for the court to refuse to dismiss the strike so that Ms. Wiley's prison sentence would not be doubled."

Appellant posits four arguments in support of her contention regarding the unreasonableness of the court's refusal to strike the prior strike: (1) the one count to which she pled no contest was a "minor felony"; (2) appellant's 1997 offense was "not . . . serious or violent" and she thus had a "relative sparseness of [a] criminal record," demonstrating that she is not a " 'career criminal' "; (3) she maintained her sobriety between 2004 and 2009 and did not get involved with methamphetamine traffic until 2009; and (4) since her 2010 arrest, she has demonstrated positive behavior and "expressed remorse."

Although these arguments are not totally lacking in merit, neither individually or in combination do they come close to establishing an abuse of discretion by the trial court in declining to strike appellant's 1997 prior conviction.

First of all, and as the trial court noted, appellant was arrested at her home with a "regular cornucopia of controlled substances" in November 2010. Those substances

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unauthorized possession of a controlled substance, appellant's *Romero* motion to strike the 1997 prior strike *had been* granted.

included several different drugs (marijuana, methamphetamine, and others that had been packaged for distribution), "four functioning digital scales," "several glass pipes," empty plastic baggies, a pricing list, and $2,050 in cash. Appellant admitted that she had been both "using and selling drugs", and admitted to "using methamphetamine on and off for the past two years," a period during which she was on probation for her prior drug conviction. Especially considering her prior convictions and the fact that, at the time of her 2010 arrest, she was on probation for a prior drug offense, the one count to which she pled no contest may have been, in isolation, "minor," but the overall offense and its surrounding circumstances were not at all "minor."

Similarly, appellant's 1997 violent felony conviction, involving her hitting a motorcycle and its rider while driving with a blood alcohol content of .23percent (resulting in major injuries to the rider) and then driving away from the scene of the accident did, indeed, constitute a "serious felony" as the trial court found.

Nor are appellant's final two points, i.e., that she had maintained her sobriety between 2004 and 2009 and, after her 2010 arrest, had joined drug and alcohol treatment programs, considered either individually or in combination with the factors just considered, particularly convincing given her record. In brief, that record started with her 1997 Vehicle Code convictions, including one for leaving the scene of a very bad injury-accident with a .23 percent alcohol level. It continued via her 2009 conviction for two counts of possession of a controlled substance (after which, as the trial court specifically noted, her *Romero* motion to strike the 1997 conviction *was* granted), her subsequent two revocations of probation, and finally her admitted (even if not consistently admitted) "middle man" drug dealing role in 2010—a role she had undertaken while on probation. That record clearly justifies the trial court's denial of appellant's *Romero* motion.

There is, however, a second point which must be addressed. As appellant points out and respondent concedes, the abstract of judgment should be corrected to reflect the fact that she was awarded conduct credits pursuant to section 4019 and not section 2933.1, because she was not convicted of a felony listed in section 667.5, subdivision (c).

IV. DISPOSITION

The judgment, including the sentence imposed, is affirmed. However, the matter is remanded to the trial court with instructions to correct the abstract of judgment as noted above.

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Haerle, J.

We concur:

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Kline, P.J.

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Richman, J.